

No. \_\_\_\_\_

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In The  
Supreme Court of the United States

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BETH PALIN,

*Petitioner,*

V.

UNITED STATES OF AMERICA,

*Respondent.*

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On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Fourth Circuit

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Did the Fourth Circuit's misinterpretation of the new materiality standard set forth in *Universal Health Services v. United States ex rel. Escobar*<sup>1</sup> lead to an erroneous determination that the evidence was sufficient to uphold the Petitioner's conviction?
2. Did the Fourth Circuit err by upholding a criminal health care fraud conviction based on an indictment that was pled without specificity or any identifiable evidence of fraud?

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<sup>1</sup> 136 S.Ct. 1989 (2016).

**LIST OF PARTIES**

The Petitioner is Beth Palin (defendant-appellant below). The Respondent is the United States of America (plaintiff-appellee below).

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## **PETITION FOR WRIT OF CERTIORARI**

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Petitioner Beth Palin (“Petitioner”) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

### **OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 874 F.3d 418. It is reprinted as Petitioner App. A. The opinion as to the Petitioner’s motion for judgment of acquittal, or for new trial in the alternative by the United States District Court for the Western District of Virginia, *United States v. Palin*, Criminal Action No. 1:14CR00023 (August 2, 2016) is unreported. It is reprinted as Petitioner App. B. The opinion as to the findings of fact and conclusions of law supporting the Petitioner’s verdict by the United States District Court for the Western District of Virginia, *United States v. Palin*, Criminal Action No. 1:14CR00023 (April 7, 2016) is unreported. It is reprinted as Petitioner App. C.

### **JURISDICTION**

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on October 30, 2017; however, a Petition for Rehearing and Rehearing *En Banc* was timely filed by the Petitioners on November 8, 2017. The Order denying the Petition for Rehearing and Rehearing *En Banc* was filed on November 28, 2017. The Order is reprinted as Petitioner App. D. This petition for writ

of certiorari is timely filed within 90 days from that date. Sup. Ct. R. 13.3. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), reprinted as Petitioner App. E.

### STATUTES INVOLVED

The relevant statutory provisions, 18 U.S.C. § 1347; 18 U.S.C. § 1349; and 31 U.S.C. § 3729; are reprinted as Pet. App. F through Pet. H, respectively.

### STATEMENT OF THE CASE

Beth Palin (“Palin”) was charged and convicted of healthcare fraud (18 U.S.C. § 1347) and the conspiracy to commit healthcare fraud (18 U.S.C. § 1349) after a bench trial. Following the conviction, the Petitioner filed a Motion for Acquittal or in the Alternative for a New Trial, which the district court denied on August 2, 2016.

Petitioner timely appealed to the Fourth Circuit, arguing (1) the District Court erred when it held materiality is not an element of the crimes of healthcare fraud and conspiracy to commit healthcare fraud; (2) the District Court erred when it refused to apply the new materiality standard explained in the case of *Universal Health Services v. United States ex rel. Escobar*;<sup>2</sup> and (3) the District Court erred by convicting defendants of healthcare fraud and the conspiracy to commit healthcare fraud without any identifiable evidence of fraud by defendants and on the basis of a generalized indictment. On October 30, 2017, the Fourth Circuit

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<sup>2</sup> 136 S. Ct. 1989 (2016)



affirmed in its entirety the judgment of the district court. Petitioner timely filed a Petition for Rehearing and Rehearing *En Banc*, arguing (1) an exceptionally important legal matter was overlooked when the panel stated they would not decide whether the case of *Universal Health Services v. United States ex rel. Escobar* impacts the materiality test used in criminal health care fraud cases; and (2) the panel's decision overlooked the material fact that neither of the Petitioners decided which type of laboratory test the patients should receive. The Fourth Circuit denied the Petition for Rehearing and Rehearing *En Banc* on November 28, 2017.

### **REASONS FOR GRANTING THE PETITION**

This Court should grant certiorari to settle important misinterpretations of the healthcare fraud statutes (18 U.S.C. § 1347; 18 U.S.C. § 1349), specifically involving the element of materiality. This Court recently settled an existing circuit split by reinterpreting the test utilized to determine whether the element of materiality was satisfied in the context of civil healthcare fraud. *See Universal Health Services v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016) However, no consensus among the circuits exists regarding the materiality standard applied in the context of criminal healthcare fraud. Furthermore, there is a disagreement among circuits regarding the sufficiency of language in fraud pleadings. In this case, the Indictment against Petitioner failed to provide adequate notice, because it was pled without any specificity or identifiable acts of fraud.

**A. The Fourth Circuit’s Misinterpretation of *Universal Health Services*’ Newly Defined Materiality Test Led to the Erroneous Determination that the Evidence was Sufficient to Uphold Petitioner’s Conviction.**

Materiality is an element of healthcare fraud and the conspiracy to commit healthcare fraud. The Fourth Circuit has held that the “healthcare fraud statute...is a simple fraud statute.” *United States v. McLean*, 715 F.3d 129, 136 (4th Cir. 2013) Therefore, materiality is read into the statute as an essential element. *United States v. Palin*, 874 F.3d 418, 421 (4th Cir. 2017) (citing *United States v. Perry*, 757 F.3d 166, 175-76 (4th Cir. 2014)). However, no consensus exists concerning the exact definition of materiality in the context of criminal health care fraud.

In *Universal Health Services*, this Court decided a question of healthcare fraud in the context of the False Claims Act<sup>3</sup> by adopting a new standard of materiality. *Universal Health Services, supra*, 136 S.Ct. at p. 2001. This Court recognized that, historically, the test for materiality in the False Claims context was identical in the criminal fraud context. The prior test involved determining whether the alleged misrepresentation had a natural tendency to influence, or be capable of influencing, the payment of receipt of money or property. *Id.* at 2002 (citing *Neder v. United States*, 527 U.S. 1, 16 (1999)). In explaining the old standard of materiality applicable to the fraud statutes, this Court cited multiple criminal fraud cases. *See Universal Health*

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<sup>3</sup> 31 U.S.C. § 3729.

*Services, supra*, 136 S.Ct. at p. 2002. Of crucial significance was that the test for materiality in the False Claims context was identical to the materiality test in criminal fraud cases.

While this Court overruled the old standard for materiality, it did not establish a bright line definition of materiality. This Court strongly suggested a behavior-based test that focuses on the actual behavior of the recipient of the misrepresentation. Analogizing to common law concepts, this Court explained that materiality depends on the effect of the behavior of the person receiving the alleged misrepresentation. *Id.* at 2002. This is best illustrated by the Court's explanation of when a misrepresentation is not material. The Court stated:

A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance. Materiality, in addition, cannot be found where noncompliance is minor or insubstantial.

*Id.* at 2003. In addition, this Court added that the Government's decision to identify something as a condition of payment is relevant but not the end of the inquiry. *Id.* More pertinent to the present matter, this Court held that:

[i]f the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.

*Id.* at 2003-2004. This ruling changed the standard of what constitutes a material representation or omission, and thus fraud. The new standard of materiality unequivocally changes what is considered material in determining whether healthcare fraud or conspiracy to commit healthcare fraud has occurred. The question of whether an act or omission is material is central to determining if fraud occurred. Specifically, the Court's statement that repeated approvals by Medicare despite actual knowledge that certain requirements were violated "is strong evidence that the requirements are not material" and a violation of that requirement is, as a result, not fraudulent. *Id.*

Furthermore, courts have repeatedly held that the standards applicable to criminal law are more stringent and taxing on the Government than on a civil plaintiff. In a concurrence written in a juvenile case, Justice Harlan wrote that, "fundamental procedural fairness requires a more stringent standard for criminal trials than for ordinary civil litigation." *In re Winship* 397 U.S. 358, 372 (1970)

(Harlan, J. concurring). Thus, even though *Universal Health Services* was decided in the civil healthcare fraud context, its ruling should be the applicable standard for deciding whether the element of materiality exists in a criminal health care fraud case.

In this case, the Court of Appeals should have applied the new test outlined by this Court in *Universal Health Services* to determine whether materiality, an element of healthcare fraud and the conspiracy to commit healthcare fraud, was satisfied. Analyzed under the new standard, the element of materiality could not be satisfied. However, the Court of Appeals overlooked an important legal issue by holding that they need not decide whether the new materiality standard applied in criminal cases of healthcare fraud. Pet. App. 9. Then, the Court of Appeals erroneously held that, even if the new test were to apply, the element of materiality would be satisfied on the facts of the case. *Id.* But in discussing the new materiality test, the court actually utilized the old materiality standard. *Id.* This misinterpretation of the standard is evidenced by the court's failure to focus on the information actually disclosed to and relied upon by the individual on the receiving side of the alleged misrepresentation (i.e. the insurers). *Id.*

If the Court of Appeals had correctly applied the new standard set forth in *Universal Health Services*, the element of materiality would not be met. The insurers consistently paid the claims submitted by Petitioner's Laboratories, despite the fact that the frequency and type tests were readily apparent and actually known by the insurers. Thus, there is very strong evidence that any alleged

representations made by the Petitioner's Laboratories were not material because, the claims were repeatedly approved, and this Court has stated that repeated approvals are central to determination of materiality. A fact finder operating under the new standard would have concluded that no material misrepresentations existed and Petitioner would not have been convicted.

At the trial level, the District Court also affirmed the Petitioner's conviction by operating under the old materiality standard because that was the controlling law at the time. The old standard, like the one used in *United States v. Triple Canopy*, stated that, "to establish materiality, the Government must allege the false statement had a natural tendency to influence, or be capable of influencing the Government's decision to pay." *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 637 (4th Cir. 2015). Ten days after this Court issued its ruling in *Universal Health Services*, it also overturned the Fourth Circuit's ruling in *United States v. Triple Canopy. Triple Canopy, Inc. v. United States ex rel. Badr*, No. 14-1440, 2016 U.S. LEXIS 4163, at \*1 (June 27, 2016). Thus, just like this Court overturned the decision in *United States v. Triple Canopy* in light of the new materiality standard detailed in *Universal Health Services*, the District Court's convictions in this case should also be overturned for applying the wrong standard<sup>4</sup>.

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<sup>4</sup> It should be noted that the District Court included in its order denying Petitioner's Motion for New Trial what it believed the outcome would have been if it had rendered its judgment under the materiality standard described in *Universal Health Services v. United States*. Pet. App. 28. However, this re-assessing of the evidence is not sufficient

Furthermore, the District Court in this case failed to make findings, beyond a reasonable doubt or otherwise, that any misrepresentation was material. The fact finder did not find the Petitioner guilty of each and every element of the crimes of which she was charged beyond a reasonable doubt. The fact finder explicitly stated that it believed that materiality was not an element of the crimes of conviction. Pet. App. 27. Specifically, the District Court's opinion makes no findings related to whether the alleged misrepresentations or omissions were material. *Id.* The first time the District Court considered materiality is in its opinion and order denying the Petitioner's Motion for New Trial. The District Court wrote that, "Unlike the False Claims Act, § 1347 does not use the term 'material,' and Palin has cited no case holding that § 1347(a) contains a materiality element." *Id.* In a footnote in its order denying a Motion for New Trial, the District Court readily admitted that materiality was not considered as an element of the crimes of conviction: "In the present case, my discussion of the requirements for a conviction under § 1347 did not include any reference to a materiality element." Pet. App. 31. Thus, the Government did not prove, and the District Court did not find, that any of the alleged misrepresentations were material.

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or proper. If the fact finder had been a jury, it would be preposterous to assume a jury could be reconvened and asked to reweigh the evidence previously presented under the new standard for an element of the crimes of conviction. Moreover, the District Court stated unequivocally in its order denying Petitioner's Motion for New Trial that it did not consider materiality an element of the crimes of conviction in when it rendered its judgment on April 7, 2016. Petitioner App. 27.

For the reasons discussed above, the Court of Appeals erred when it affirmed the Petitioner's conviction because the District Court never found, beyond a reasonable doubt, that the Petitioner's representations to insurers were material<sup>5</sup>. Therefore, the District Court failed to find the Petitioner guilty of each element of the offense, so the Court of Appeals should have overturned the Petitioner's conviction.

**B. The Fourth Circuit Should Have Overturned Petitioner's Conviction Because Criminal Health Care Fraud Must Be Pled With Specificity And Identifiable Evidence of Fraud.**

The Court of Appeals should have overturned the Petitioner's conviction, because her indictment was pled without any specificity or identifiable evidence of fraud.

Petitioner's Indictment failed to identify a single overt act or omission by the Petitioner on which its claims of healthcare fraud and conspiracy to commit healthcare fraud were based. Pet. App 73-95. Instead, the Indictment is generally pled and lacks a single substantive count that identifies acts of healthcare fraud or conspiracy to commit healthcare fraud of which the Petitioner was accused. *Id.* The allegations in the Indictment state that Petitioner either owned or constructively owned Bristol, sought to make a profit, and did make a

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<sup>5</sup> Petitioner maintains that no misrepresentation was ever sent to any insurer. Each bill represented a real urine drug screen performed pursuant to a real physician order and for a real addiction patient.



profit by running tests pursuant to physician orders. Pet. App. 34-53. In fact, the Petitioner is not mentioned until the ninth page of the Indictment. Pet. App. 40. Further, no bad act is identified with specificity – there is no time, place, or action described in a substantive count in the Indictment. Pet. App. 34-53. Simply stated, the Indictment is a generalized pleading.

The Eleventh Circuit held that an indictment was insufficient because it failed to “represent the essential elements of fraud” and did “not notify [the defendant] of the charges to be defended against.” *United States v. Schmitz*, 634 F.3d 1247, 1261 (11th Cir. 2011)(internal citations omitted). The Eleventh Circuit added that “for an indictment to be legally sufficient, it must notify the accused of the charges to be defended against.” *Id.* After citing to Federal Rule of Criminal Procedure 7(c)(1), the Eleventh Circuit added that, “even when an indictment tracks the language of the statute, it must be accompanied with such a statement of the *facts and circumstances* that will inform the accused of the *specific offense*, coming under the general description, with which he is charged.” *Id.* (emphasis added; internal citations removed). A Fourth Circuit court, though finding the indictment before it adequate, stated “it would have been desirable to state in the indictment, with greater particularity, the facts and circumstances, disclosing particularly wherein the claim of \$79.61 was false and fraudulent.” *Newton v. United States*, 162 F.2d 795, 797 (4th Cir. 1947). In the present Indictment, there were absolutely no details of any individual bills or invoices that were fraudulent. Pet. App. 34-53. Thus, the present case is like the case before the Eleventh Circuit, which held that, because

there was no allegation of facts or circumstances that informed the defendant of the specific charges, the counts were “insufficient as a matter of law.” *United States v. Schmitz*, 634 F.3d at 1261. The Court of Appeals erred by affirming a conviction based on an Indictment that was insufficient as a matter of law.

Furthermore, as pled, the Indictment would fail scrutiny for particularity under the civil standard. In the False Claims Act context, the Ninth Circuit held:

To survive a Rule 9(b) motion to dismiss, a complaint alleging implied false certification must plead with particularity allegations that provide a reasonable basis to infer that (1) the defendant explicitly undertook to comply with a law, rule or regulation that is implicated in submitting a claim for payment and that (2) claims were submitted (3) even though the defendant was not in compliance with that law, rule or regulation.

*Ebeid v. Lungwitz*, 616 F.3d 993, 993 (9th 2010). Simply stated, a plaintiff in a False Claims case is required to “plead fraud with some level of specificity.” *Id.* at 999. The Government in a criminal context, as discussed above, should not be held to a lower standard than a civil plaintiff in the False Claims context. The Government bringing a claim of criminal fraud should be held to a higher standard of proof and scrutiny because the risk of error results in the loss of a defendant’s freedom.

**CONCLUSION**

For the reasons set forth above, a writ of certiorari should be granted.

Respectfully submitted,  
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